

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN R. ELLIFRITS, DECEASED

Claimant

VS.

NPC INTERNATIONAL d/b/a PIZZA HUT

Respondent

AND

OLD REPUBLIC INSURANCE COMPANY

Insurance Carrier

Docket No. 1,056,498

ORDER

Respondent and its insurance carrier (respondent) appealed the January 3, 2014, Award entered by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on April 15, 2014.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared for claimant. Thomas J. Walsh of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant sustained injuries from a robbery and assault arising out of and in the course of his employment with respondent on September 18, 2010. Claimant was prescribed fentanyl patches as part of his medical treatment. On or about April 13, 2012, claimant died as a result of fentanyl intoxication. Citing K.S.A. 44-501(d)(2), the ALJ found claimant's death was not compensable as his death was caused by his non-accidental use of fentanyl in excess of a therapeutic dose. ALJ Belden found claimant's misuse of fentanyl did not contribute to the September 18, 2010, accidental injuries and that those injuries were compensable.

As claimant at the time of his death was actively receiving medical treatment for his injuries, he was not yet at maximum medical improvement and his condition was not permanent in quality, the ALJ determined claimant was not eligible to receive permanent disability benefits. ALJ Belden awarded claimant temporary total disability benefits; valid, authorized and related medical benefits for the September 18, 2010, accidental injuries and unauthorized medical benefits.

Respondent contends claimant's injury and death were contributed to by claimant's use of prescription drugs in excess of the therapeutic dose and, therefore, respondent is not liable under the Workers Compensation Act. Respondent maintains the statutory language of K.S.A. 44-501 is plain and unambiguous and, therefore, respondent should not be found liable for claimant's initial injury or resulting death.

Claimant filed no brief in this matter, but at oral argument asked the Board to affirm the Award.

The sole issue for the Board to determine on appeal is: does claimant's death from an overdose of a prescription medication relieve respondent from liability for claimant's initial compensable injury?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The ALJ's Award sets out detailed and accurate findings of fact. It is not necessary to repeat the findings of fact in this Order and the Board adopts the ALJ's findings as if specifically set forth herein. The Board would note that claimant's original work injury was sustained on September 18, 2010. On that date, the 2011 amendments to the Workers Compensation Act ("Old Act") had not yet been enacted. On May 15, 2011, prior to claimant's tragic death on or about April 13, 2012, the Workers Compensation Act, including K.S.A. 44-501 and 44-510b, was amended ("New Act").

PRINCIPLES OF LAW AND ANALYSIS

At the time of claimant's accident, K.S.A. 2010 Supp. 44-501(d)(2) stated, in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a

prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.

Respondent asserts it is not liable for claimant's work injury and subsequent death because they were contributed to by his use of prescription drugs in excess of the therapeutic dose. In its brief, respondent argues K.S.A. 2011 Supp. 44-501(b)(1)(A) and (B), the "New Act," is plain and unambiguous. Respondent asserts the "New Act" applies, as claimant's death occurred after May 15, 2011. At oral argument, respondent contended it should not be liable whether the "Old Act" or "New Act" is applied, as K.S.A. 2010 Supp. 44-501(d)(2) and K.S.A. 2011 Supp. 44-501(b)(1)(A) and (B) have similar language.

K.S.A. 2011 Supp. 44-501(b)(1)(A) and (B) state:

(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

(B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.

The Board finds the "Old Act" or K.S.A. 2010 Supp. 44-501(d)(2) controls as it was in effect on the date of claimant's accident. However, the "New Act" or K.S.A. 2011 Supp. 44-501(b)(1)(A) and (B) is identical to the portion of K.S.A. 2010 Supp. 44-501(d)(2) quoted above, and the Board's affirmation of the Award would not change if the "New Act" applied.

Respondent contends the law indicates an employer is not liable under the Act where the injury, disability **or** (emphasis added) death was contributed to by the non-therapeutic use of prescription medications. Respondent interprets the foregoing passage to mean: if an employee sustains a work-related injury and there is no evidence of drug usage, but later becomes disabled or dies as the result of the non-therapeutic use of a prescription drug, the employer is not liable for the initial work-related injury. The Board finds that legal analysis is flawed.

Instead of applying one fentanyl patch to his right shoulder as prescribed, claimant applied four fentanyl patches. The physician who conducted the autopsy found fentanyl in claimant's blood at a concentration in marked excess where overdose death occurs. The Report of Death indicates a diagnosis of fentanyl intoxication. There is no evidence in the record that claimant's initial work injury was contributed to by use or consumption of alcohol, illegal drugs or prescription medications.

The Board concurs with the ALJ when he stated in the Award:

Claimant's misuse of Fentanyl, however, did not contribute to [the] original accident or to the initial injuries sustained on September 18, 2010. The Kansas Supreme Court held an employer was not liable for the payment of medical expenses to treat an overdose of medication prescribed to treat an injury covered under the Kansas Workers Compensation Act, but did not hold the initial injury noncompensable. See *Carr v. Unit No. 8169/Midwestern Distribution*, 237 Kan. 660, 666-67 (1985). The Appeals Board also awarded compensation for an initial compensable right leg injury, after determining a subsequent stroke caused by cocaine and amphetamine use was a new and distinct injury unrelated to the compensable right leg injury. See *Kearn v. Condray Farms, Inc.*, Docket No. 1,037,777, pp. 4-5 (W.C.A.B. 2012). The Court finds the same analysis applicable to this case. Claimant initially sustained compensable physical injuries from the assault and robbery of September 18, 2010, for which Claimant was receiving medical treatment and temporary total disability compensation. Claimant's later misuse of Fentanyl created a new and unrelated injury for which compensation is not payable under *Carr*, but it did not render the initial injuries of September 18, 2010 noncompensable. The Court concludes, based on the evidence contained in the whole record, Claimant sustained compensable injuries from the assault of September 18, 2010, which arose out of and in the course of his employment with Respondent. Although Claimant cannot recover compensation in association with the subsequent overdose of Fentanyl, this unrelated event does not render the accidental injuries of September 18, 2010 noncompensable.¹

Accordingly, the Board affirms the ALJ's finding that claimant's initial work-related injuries are compensable.

CONCLUSION

The Board finds claimant's initial work-related injuries are compensable and affirms the award of benefits in favor of claimant as a result of said injuries, including 79.42 weeks of temporary total disability payments, medical expenses related to claimant's September 18, 2010, work injury and unauthorized medical, if any, up to \$500.

¹ ALJ Award at 4-5.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the January 3, 2014, Award entered by ALJ Belden.

IT IS SO ORDERED.

Dated this ____ day of May, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
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Honorable William G. Belden, Administrative Law Judge

² K.S.A. 2013 Supp. 44-555c(j).